Filed 3/30/09 P. v. Preciado CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RAFAEL PRECIADO, Defendant and Appellant.	B208909 (Los Angeles County Super. Ct. No. BA337380)

APPEAL from a judgment of the Superior Court of Los Angeles County. William N. Sterling, Judge. Affirmed as modified.

Allison K. Simkin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Diane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Rafael Preciado was convicted of second degree robbery. He was sentenced to the upper term of five years in prison. He contends that: (1) The trial court erred in failing to instruct sua sponte on attempted robbery as a lesser included offense. (2) The trial court improperly limited questioning regarding the police department's policy on arresting intoxicated persons in the park. Respondent adds that certain mandatory fines and assessments should have been imposed. We modify the judgment regarding fines and assessments and otherwise affirm.

FACTS

Around 10:00 a.m. on March 5, 2008, Regino Mateo Flores drank about five 16-ounce containers of beer. At 2:00 p.m. that afternoon, he went to MacArthur Park to rest. He testified that he no longer felt the effects of the alcohol at that time. He lay down on the grass and took a short nap. After he awakened, he was approached by appellant and two other men. He had never seen them before.

Appellant asked Flores for 50 cents. Flores pulled his wallet from his pants pocket and gave appellant a dollar. Appellant thanked Flores and then suddenly grabbed him, pushed him face down on the ground, and got on top of him. Working together, appellant and his companions covered Flores's mouth and removed his wallet. Flores felt one of them break his foot. As they walked away, Flores sat up. Appellant threw the wallet back to him. A $20 bill and a $64 monthly bus pass were missing from it.

Flores waved at two police officers who were on duty in the park. They approached him, and he told them what had happened. An ambulance took him to the hospital for treatment of his foot. The officers put out a broadcast that included a description of appellant. He was soon arrested at the Metro station near the park. He matched the description in terms of gender, nationality, height, weight, and clothing. He was alone and did not have the stolen property on his person at that time.

Officers transported appellant to Flores's hospital. Flores identified appellant.

At the police station, appellant was interviewed by a detective. At first, appellant said he injured Flores when he pushed Flores down while trying to break up

a fight. Next, appellant said, "If I'm in jail for injuring his leg, then I'm in jail for injuring his leg, but I didn't rob him." Finally, appellant said he threw Flores down and took his wallet. He intended to take money from the wallet, but there was no money in it so he gave it back. He apologized for hurting Flores's leg and asked for forgiveness.

DISCUSSION

1. Failure to Instruct on Attempted Robbery as a Lesser Included Offense

Appellant contends that the trial court erred in failing to instruct sua sponte on attempted robbery, as there was evidence to support a finding that the robbery was not completed. The contention lacks merit.

"'California decisions have held for decades that even absent a request, and even over the parties' objections, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser.' [Citation.]" (*People v. Lacefield* (2007) 157 Cal.App.4th 249, 256.)

An instruction on attempted robbery as a lesser included offense of robbery is mandatory if there is evidence that would support a finding that the defendant was guilty only of the lesser offense. (*People v. Calpito* (1970) 9 Cal.App.3d 212, 220.) Here, however, there was no substantial evidence that appellant was guilty only of the lesser offense. Flores testified that appellant pushed him down, took his wallet, and threw back the wallet without the $20 bill and bus pass that had been inside of it. Even if appellant's version of the events is believed, i.e., that he did not personally take money from the wallet, he still admitted he took it and gave it to his cohort, so he was guilty as an aider and abettor. There was no evidence that the crime was only an attempted robbery, so the court had no sua sponte duty to instruct on that lesser offense.

Appellant's reliance on *People v. Crary* (1968) 265 Cal.App.2d 534 is misplaced because, unlike the facts here, there were unusual facts in *Crary* that could support a finding that the crime was only an attempted robbery.

2. The Limitation on Cross-examination

The issue concerns the testimony of one of the two police officers who approached Flores in the park. During extensive cross-examination, the officer said that he and his partner went over to Flores because Flores waved at them, he had not intended to "go over to check on" Flores before Flores waved, and he did not smell alcohol on Flores's breath. Later in the cross-examination, the following questioning and ruling occurred:

> "Q BY MR. YANUCK [defense counsel]: What is the rule about sleeping in the park? Is there a rule?
>
> "MS. NISTORESCU [the prosecutor]: Objection. Relevance.
>
> "THE COURT: Sustained.
>
> "Q BY MR. YANUCK: What's the rule about being drunk in the park?
>
> "MS. NISTORESCU: Objection. Relevance.
>
> "THE COURT: Sustained.
>
> "Q BY MR. YANUCK: When you drive through the park, do you detain and arrest people for being under the influence of alcohol? Public intoxication?
>
> "A Yes.
>
> "Q Does it mater if they're homeless or rich whether you're going to arrest them for being --"

At that point, the court requested an offer of proof at sidebar regarding relevancy. Defense counsel said, "The offer of proof is they were conducting an investigation about Mr. Flores and about being drunk in the park and that's when he came up with the story about being robbed." The court responded, "He's already testified that's not what he was doing. There's no foundation for you to pursue a general line of how they investigate or do they investigate people drinking or being intoxicated in the park when he told you he responded to Mr. Flores because Mr. Flores waved at him and he did not appear to be under the influence. . . . [¶] . . .

[¶] I'm not going to allow you to pursue this line of questioning. We're wasting time. Let's go on."

Appellant maintains that the trial court improperly restricted his right to question about whether the police department had a policy of approaching sleeping and intoxicated park patrons. According to him, the questioning would have provided a defense by "permitting the jury an opportunity to consider whether Flores invented the facts of the robbery after the police harassed him for being drunk in the park, or for sleeping in the park."

We use the abuse of discretion standard to review the trial court's ruling. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1120.) There was no abuse of discretion here. The trial court properly found that it was irrelevant how the police dealt with sleeping drunks in the park. Moreover, there was no way Flores could have "invented the facts of the robbery," as Flores's foot was broken during the incident, he was taken to the hospital for treatment of his foot, and appellant confessed to the crime.

3. Additional Fines and Assessments

The trial court imposed a $20 court security fee (Pen. Code, § 1465.8), a $10 fine (Pen. Code, § 1202.5), $60 in victim restitution (Pen. Code, § 1202.4, subd. (f)), and a $200 restitution fine (*id.*, subd. (b)). It suspended a $200 parole revocation restitution fine (Pen. Code, § 1202.45).

Page 1 of respondent's brief states, in a footnote: "Appellant should have received $22 in additional fines and assessments, as follows: $10 and $7 for penalty assessments (§ 1464, subd. (a)(1); Gov. Code, § 76000); $3 for a state construction fee (Gov. Code, § 70372, subd. (a)); and a $2 state surcharge (§ 1465.7, subd. (a))." Appellant does not dispute this issue. Respondent is correct under *People v. Walz* (2008) 160 Cal.App.4th 1364, 1372-1373.

DISPOSITION

The judgment is modified to reflect imposition of the following mandatory penalty assessments and surcharges: $10 pursuant to Penal Code section 1464, subdivision (a)(1); $7 pursuant to Government Code section 76000; $3 pursuant to

Government Code section 70372, subdivision (a); and $2 pursuant to Penal Code section 1465.7, subdivision (a). The trial court shall prepare a new abstract of judgment that includes these amounts and forward a certified copy to the Department of Corrections and Rehabilitation. In all other aspects, the judgment is affirmed.

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FLIER, ACTING P. J.

We concur:

BIGELOW, J.

BAUER, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.